U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

Dated: August 19, 1993

Case No: 93-SOC-2

In the Matter of:

JOHN RIORDAN,
Complainant

v.

DISTRICT #2, AMERICAN
FEDERATION OF GOVERNMENT
EMPLOYEES
Respondent

John Riordan, pro se

Charles Hobbie, Esq.
Washington, D.C.
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §401 et seq. ("LMRDA" or "the Act"), and the regulations contained at 29 C.F.R. §458 et seq. On February 21, 1992, John Riordan ("complainant") filed a complaint against District #2 of the American Federation of Government Employees ("respondent") alleging a violation of the equal rights provision of 29 C.F.R. §458.2(a)(1), "Bill of rights of members of labor organizations." (See JX 40-42).[1] A formal hearing was held in New York City on March 30, 1993. The record was closed on receipt of the parties' briefs. The issues to be decided are: (1) whether union members were denied equal rights due to loss of voting strength; (2) whether complainant was

[1] The following abbreviations will be used when citing to the record in this case: JX--Joint Exhibit; TR--Hearing transcript.

denied the right to effectively participate as a candidate; and (3) whether the nomination requirements denied members the opportunity to participate as candidates.[2]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the August 1991 National Convention of the American Federation of Government Employees ("AFGE"), a resolution was passed whereby a Special Committee was to be formed to review the structure of AFGE (TR 185; JX 4). The resolution mandated that two delegates from each district be elected to the Special Committee by January 1, 1992 (TR 185). The transcript of the convention, which contained the resolution, was not available until mid-September of 1991 (TR 211). In order to meet the deadline mandated by the resolution, Mark Roth, General Counsel for AFGE, immediately upon receipt of the transcript drafted rules regarding the election of delegates to the Special Committee (TR 211). These rules provided for each local to hold a meeting to elect delegates who in turn would elect the two representatives from their district who would serve on the Special Committee (JX 5, 6).

The districts had two options for the election of representatives to the Special Committee. The delegates could vote by mail ballot or at a Special Caucus (see JX 5, 6). The National Vice President ("NVP") of each district had the authority to select the method of voting on behalf of his or her district. After randomly surveying several locals in her district to determine their preference, Rita Mason, the NVP for District #2, chose to participate in the Special Committee election by mail ballot (TR 193; see also JX 7). District #8 was the only other district that participated in the election by mail ballot (TR 206).

The rules for those districts who chose to participate in the Special Committee Election by mail ballot required that meetings be held and delegates be elected by each local;[3] if, however, that local had participated in the 1991 convention, was in good standing, and had elected its delegates to serve for the entire year to attend all caucuses and conventions, it was not necessary to hold such a meeting (JX 5). The rules were received by local presidents on or about October 15 (TR 134). They required that the credentials of the locals' delegates be postmarked by November 5, 1991, which gave the locals only about 21 days to send 15-day notices of meetings, hold meetings and conduct elections of delegates. Nevertheless, almost all of the 45 participating locals in District #2 managed to comply with the rules (TR 128). Upon receiving a few complaints that there was not enough time to hold the required meetings and elections, the General Counsel for AFGE extended the deadline to November 29, 1991. The elections had to be completed by December 31, 1991 to meet the January 1, 1992 deadline set by the resolution (JX 15; TR 217-18).

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[2]At the hearing, the parties were asked to brief the issue of whether this case is moot. Since the case is being dismissed for other reasons, it would serve no purpose to address that issue in this decision.

[3]The number of delegates to be elected by each local was proportional to that local's membership, i.e., 1 delegate for 100 or fewer members, 2 delegates for 101-200 members, etc. (See JX 1 Article VI Section 2; JX 5, 6).

Once the delegates for each local were elected, the president of each local was to send credentials for each delegate indicating that that person had been duly elected and had been authorized to vote in the Special Election on behalf of the local (JX 5, 13, 71). The rules also provided for the authorization of members who had previously been elected delegates (see supra) or were delegates by virtue of their offices in the locals, e.g., the president of a local may also serve as a delegate (See JX 5, 6). In the event a delegate's credentials were not received, or a delegate did not attend the caucus (in the case of districts voting at the Special Caucus), or a local failed to comply with the rules by failing to elect delegates to vote for the Special Committee members, the local's voting strength was decreased proportionately (TR 219-20).

For example, a local with a membership of 300 would be allowed 3 delegates, with a voting strength of 100 votes each. If credentials were provided for only two of them, then only these two delegates could vote, and each would be limited to 100 votes.[4] According to Mark Roth, General Counsel for AFGE, the proportional decrease, which was applied consistently at all elections, was to prevent officers of the locals from attempting to vote the entire voting strength of the local without authorization from its members (TR 219-20). Moreover, Roth stated that AFGE acted on advice from the Department of Labor, who was supervising another of its elections, with regard to application of the proportionate decrease (TR 218-19).

The rules also addressed the manner in which a member could become a candidate for the Special Committee. In districts participating by mail ballot, a member could become a candidate simply by declaring himself or herself a candidate in writing (JX 5). This rule acknowledged the tight time schedule of the election and attempted to avoid the need for a candidate to be nominated and then accept by mail, thereby making it easier for a member to be nominated (TR 221). In districts participating in the Special Caucus, the delegates to the Special Caucus could nominate any member in good standing at the Caucus (JX 8).

Complainant, President of Local 3369 in District #2, did not hold a meeting due to what he believed were "unreasonable" time constraints (TR 134, 159,), despite the extension of time that was granted (TR 159). While he initially declared himself a candidate for the Special Committee, he later withdrew his own nomination .in protest of the manner in which the election was being run (JX 26). Complainant made several complaints to his District NVP Mason, National President John Sturdivant, and one of the Special Committee election winners, Joe Riley, regarding the time constraints, the fairness of the election, and the manner in which the election was conducted (the method by which candidates could be nominated, the failure of AFGE to provide him with the credentials of the other candidates, and the loss of voting strength incurred by those locals which did not comply with the rules promulgated for the Special Election] (JX 12, 26, 35, 38, 39). Dissatisfied with the responses he received (JX 24, 28, 37), complainant filed a formal complaint with the Department of Labor (JX 40).

DISCUSSION

Title I of the LMRDA is "designed to guarantee every union member equal rights to vote and otherwise participate in union decisions." Local No. 82, Furniture & Piano Moving,

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[4]For more examples and a more detailed explanation, see JX 16.

Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley, 467 U.S. 526 (1984); see also 29 U.S.C. §411(a)(1). The "Bill of rights of members of labor organizations" set out at 29 C.F.R. §458.2 (a)(1) provides:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

Id. (emphasis added); see also 29 U.S.C. § 411(a)(1). In an action alleging a bill of rights violation, the burden of proving such violation, by a preponderance of the evidence, is on the complainant. 20 C.F.R. §458.79.

In order to state a claim under this section of the Act, a complainant "must allege a denial of rights accorded to other members." Ackley v. Western Conference of Teamsters, 958 F.2d 1463, 1473 (9th Cir. 1992), citing Calhoon v. Harvey, 379 U.S. 134, 138-39 (1964). The Supreme Court has held that the words underlined above are "no more than a command that members and classes of members shall not be discriminated against in their right to vote." Calhoon, 379 U.S. at 139.

I

This case arose as a direct result of the complainant's intransigence. Because he believed that the short deadline set by the union to elect '"delegates to the Special Committee was "unreasonable" (TR 159), complainant refused to even attempt to hold the election. Had he complied with the union's directive and held the election, none of the subsequent problems would have materialized. Although it may not have been easy to set up a meeting and get almost 800 notices mailed out in six days, such a task is far from impossible. In absolutely refusing to attempt to comply, it was the complainant who was unreasonable, and who needlessly precipitated this action. Moreover, he denied his local 6/7 of the votes to which it was entitled in the election of representatives to the Special Committee.

Further, claimant has failed to establish that he was denied rights similar of those of other members. Complainant contends that union members were denied an equal right to vote because of the proportionate decrease in voting strength some locals incurred (Complainant's Post-trial Brief at 10-12). Complainant's local, having a membership of 776, was entitled to up to seven delegates in the Special Election (JX 9). Complainant failed to hold the meeting to elect delegates as mandated by the rules for the Special Election. At the hearing,[5] Sharon Schwarz,

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[5]Complainant has requested that the issue of official time for witnesses participating in this hearing be addressed. The regulations contained at 29 C.F.R. §458.72(c) provide:

> Employees who have been determined to be necessary as witnesses at a hearing

(continued...)

Special Events Coordinator for District #2 and a member of Local 3369, testified that complainant told her he had no intention of holding the meeting because the notice had been untimely and did not allow him to do a mass mailing (TR 177). She testified she "thought that curious" since he had scheduled other meetings with even shorter notice (Id.). When some districts complained about the tight time frame, the deadline for returning credentials was extended (TR 217-18; JX 15). Complainant still did not hold a meeting (TR 159). While he testified that the tight time frame did not allow him to mail a 15-day notice to all 800 members, he also admitted that only about 25 or 30 members ever attend the meetings (TR 160-61). Thus it appears that scheduling the meeting would not have been as difficult as complainant contended.

Moreover, complainant himself acknowledged in his brief that he understood how the rules required delegates to be elected. Because the three members of his local who were delegates to the 1991 National Convention were neither delegates by virtue of office nor elected to attend all caucuses for the year, it was necessary for Local 3369 to hold a meeting to elect delegates for the mail ballot election (see Complainant's Post-trial Brief at 12). However, complainant failed to comply with these rules "[s]ince there was insufficient time to hold a meeting with a 15-day advance notice sent to each member." (Id. at 12). Complainant inferred from the fact that there was little time to comply with the rules for the Special Election that he, the sole eligible delegate, would receive the full share of the local's votes (Id. at 12). Nevertheless, complainant testified at trial that for other conventions, a meeting would be held to elect delegates to the conventions and the voting strength was divided among the elected delegates proportionately (TR 152-54).

Additionally, counsel for AFGE received a confirmation letter from the Department of Labor in November of 1991 regarding AFGE's interpretation of the voting rules (JX 16). That letter indicates that only after proper notice may a local vote to send fewer delegates to a caucus than it is entitled. In that case, the delegates are entitled to vote 100% of the union's voting strength. It further indicates that a local loses a proportional share of its voting strength when its delegate strength is greater than the number of delegates by virtue of office and fails to elect additional delegates. Complainant failed to hold the required meeting to either elect delegates or vote to allow fewer delegates to participate in the Special Election. As a result, and in accordance with the rules, his local's voting strength was proportionately decreased.

Complainant correctly notes that the rules provide that officers of locals were permitted to serve as delegates by virtue of their office without further election (JX 5, rule 3A); and, in fact, complainant was permitted to serve as a delegate. However, this must be read in conjunction with the rest of the rules requiring that those delegates who were not elected for the entire year be

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[5](...continued)
shall be granted official time only for such participation as occurs during their regular work hours and when they would otherwise be in a work or paid leave status. Participation as witnesses includes the time necessary to travel to and from the site of a hearing, and the time spent waiting to give testimony, when such time falls during regular work hours.

The Social Security Administration is strongly urged to comply with these regulations with regard to its employees who were witnesses at this trial.

designated as delegates for Special Committee election purposes (JX 5 at Rule 2A). The effect of these rules, when read together, is to require that the locals elect the full number of delegates to which they are entitled to vote in the Special Election (see also JX 16). At trial, General Counsel Roth testified that the purpose of the rules was to prevent an ex-officio officer, serving as a delegate, from trying to vote an entire local's strength without authorization to do so (TR 21819). Local 3342 in District #2 had its total voting strength proportionately decreased despite the fact that it voted to authorize its president to vote its entire strength. In that case, the president failed to timely submit the required credentials, i.e., documentation of authorization (JX 25, 29).

Complainant appears to argue that because he believed there was insufficient time to hold a meeting to elect delegates for the Special Election and because the rule regarding proportionate voting was not "made plain to local presidents in advance" of the distribution of votes, respondent violated the equal rights provision of the bill of rights. Complainant is correct in his contention that there was no mention of the proportionate decrease in voting strength in the mail ballot rules.[6] However, at trial, he admitted that all other union votes were conducted by proportionate voting (TR 152-54). He is equally correct in his contention that the time frame for holding the meeting was tight. This does not, however, excuse complainant from even attempting to complying with the rules for the Special Election, which clearly mandate that a meeting to elect delegates, if necessary, be held (JX 5). Such an argument is tantamount to saying "if I had known there would have been a proportionate decrease in voting strength for failure to hold the meeting, then I would have found time to hold the meeting." Moreover, of the 105 locals in the district, 45 participated in the election; almost all of these locals held meetings (TR 128). Only five of these locals incurred a decrease in voting strength (TR 123-28; see, e.g., JX 28-30). The home locals of NVP Mason (TR 125-26) and Election Committee Chairperson Elizabeth McKinney (TR 122-24) were two of the five.

As discussed above, complainant has to show that some union members were denied a right to vote which was granted to other union members in order to establish an equal rights violation. Calhoon v. Harvey, 379 U.S. 134, 139 (1964). The Supreme Court noted in Calhoon that this right to non-discrimination is subject to reasonable rules and regulations. Id. The Court stated in United Steelworkers of America v. Sadlowski, 457 U.S. 102, 111 (1982) that to determine whether a union rule is valid under the LMRDA, two questions must be considered: (1) whether it interfered with an interest protected by the bill of rights, and if so, (2) whether it is "reasonable." The Court further clarified "reasonable" as whether a rule is "reasonably related to the protection of the organization as an institution." Id. at 112.

In the instant case, all of the locals were required to hold a meeting to elect delegates unless they had elected their delegates for the year. All of the locals who failed to comply with the election rules for the special election incurred a proportionate decrease in voting strength. The fact that there were only five locals who lost voting strength does not establish a violation of the equal rights provision of the bill of rights. On the contrary, it shows that most locals could and did comply with the mail ballot rules. While admittedly the time schedule was tight, complainant's own testimony establishes that the customary union procedure for the election of delegates and proportionate voting was followed. The reason given for the tight time schedule

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[6]Proportionate voting strength was discussed in the rules for the Special Caucus (JX 6).

was the delay in receipt of the transcript of the 1991 National Convention. In order to comply with the resolution regarding the Special Committee, the election had to be completed by December 31, 1991. The need to comply with union resolutions, especially one that was aimed at restructuring the union, is reasonably related to the protection of the union as an institution.

Furthermore, the proportionate decrease in voting, which was the usual union practice, was intended to prevent officers from voting their entire locals' strength without the necessary authorization. The very purpose of the LMRDA is to assure democratic conduct of the union. Local No. 82, 467 U.S. at 526; see also Sadlowski, 457 U.S. 2346. Requiring proper authorization to vote an entire local's strength is consistent with promoting democratic conduct. In addition, local presidents were the only members who received notice of this Special Election. The authorization requirement, and proportionate voting loss for failure to receive that authorization, would protect against abuses by presidents who chose to "sit on their hands" and vote the entire local's strength without notice to their locals (JX 37, 45 at 2). By ensuring a fairer and more democratic election, this rule is also reasonably related to protecting the union as an institution.

Complainant has thus failed to establish, that respondent violated the equal rights provision of the bill of rights by holding an election in a short time span or by assessing a decreased proportion of voting strength to locals who did not comply with the rules for mail ballot participation.

II

Complainant next contends that he was denied the right to participate as a candidate because he was not provided with a list of candidates and their credentials. Complainant does not, however, address this issue in his Post-trial Brief. Nevertheless, it will be addressed herein.

Complainant on two occasions requested a list of the candidates and copies of their credentials (JX 17, 21). He was provided with a list of candidates when he got the actual ballot (TR 139), but was not provided with copies of their credentials (TR 139). At trial, however, NVP Mason testified that copies of credentials are not normally available to candidates (TR 188). General Counsel Roth testified that under AFGE's constitution, candidates are not entitled to either of these pieces of information, even in officer elections (TR 224).[7]

In addition, there is no evidence in the record that any of the other candidates were provided with this information. Candidate Bruce Friedman, Treasurer of AFGE Local 1760, testified that he received no response to his request for a list of the delegates to the Special Committee (TR 81). According to Roth's testimony, this was information to which Friedman was not entitled (TR 224-26). Regardless, complainant has not indicated how the failure to obtain candidates' credentials prejudiced him in any way. Complainant has thus failed to establish that respondent violated the equal rights provision of the bill of rights by failing to provide him with a list of candidates and their credentials.

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[7]It is unclear why the AFGE has adopted this secretive policy regarding a candidate's credentials, and nothing in this decision should be construed as sanctioning this practice.

III

Complainant's final contention is that union members were denied the opportunity to participate as candidates due to the nomination procedure. Complainant mentions the procedure itself in his brief, but does not address this issue. Again, it will nonetheless be addressed herein. Complainant contends that because the notice of nominations was not distributed to all members and the notice was worded so as to require self-nomination, the equal rights provision of the bill of rights regarding the right to nominate was violated.

With regard to distribution of the notice, a copy was sent to the president of each local (TR 105). Locals that complied with the mandatory requirement of a meeting would have had ample opportunity to advise their members of the procedure for nominations. Any other member interested in becoming a candidate could contact his or her president. As the President of his local, complainant received this notice.

As for the requirement of self-nomination, the Supreme Court case cited supra directly addresses this issue. In Calhoon v. Harvey, 379 U.S. 139, 295 (1964), the Supreme Court considered whether union members' rights to nominate were infringed by the requirement of self-nomination.[8] The Court noted that

> the equal rights language of §101(a)(1) would have to be stretched far beyond its normal meaning to hold that it guaranteed members not just a right to "nominate candidates," but a right to nominate anyone, without regard to valid union rules.

Id. at 295. In addition, the Court not only held that the union members had been denied no right which the union granted to others, but also noted as significant that the complaining union members had taken full advantage of the requirement of self-nomination by nominating themselves for office. Id.

In the instant case, union members took full advantage of the ability to nominate themselves--complainant included (TR 137). Liz McKinney testified that thirteen nominations were received, and only two were rejected (TR 104-05). The two that were rejected were postmarked late (TR 105). Complainant's nomination was accepted (JX 19). Complainant also nominated Richard Kirchner (JX 12). Richard Kirchner became a candidate, although it is unclear whether this was a result of complainant's nomination or a separate request by Kirchner (TR 109, 137).

Complainant contends that the requirement of self-nomination unfairly restricted members of those districts which participated in the mail ballot election. In the districts which participated in the Special Caucus, the delegates to the Special Caucus could nominate any member in good standing at the Caucus (JX 8). There was no voting situation where any member was given an absolute right to nominate any other member (JX 8).

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[8]The union members were also challenging the constitutional provisions which limited eligibility for union office to those union members who had fulfilled certain requirements. Calhoon, 379 U.S. at 139.

Contrary to what complainant would argue, it appears that the "requirement" of self-nomination made it substantially easier for a local member in the districts which participated in the election by mail ballot to become a candidate. Moreover, AFGE General Counsel Roth testified that the intent of the rule was to "open it up so that anybody could be nominated and nominate themselves." (TR 221). It was not, he testified, intended to restrict nominations (TR 221). Rather, it was to accommodate the tight time schedule of the election, which would not permit nominations by mail and then acceptances by mail to be received by the deadline (TR 221).

All of the locals in Districts #2 and 8 were subject to the self-nomination requirement in the rules. They became subject to these rules when their NVP's chose to conduct the election of Delegates to the Special Committee by mail ballot. These districts were not singled out; all districts could potentially have been subjected to the rule regarding self-nomination. Testimony at trial establishes that there was no intent to discriminate in the drafting of the rule. In addition, the only candidates who were rejected were those who did not submit their declarations on time. Even the members whose locals participated by Special Caucus did not have the absolute right to nominate; nominations could only be made by Delegates to the Special Caucus. Complainant has failed to establish that he was denied a right accorded to others; thus, he has failed to establish that the requirement of self-nomination violated the equal rights provision of the bill of rights.

RECOMMENDED ORDER

It is recommended that the complaint of John Riordan alleging violations under 29 C.F.R. 5458.2(a)(1) is dismissed.

JEFFREY TURECK
Administrative Law Judge